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Supreme Court of the United States

October Term 1978

No. 78-1185

LUCY M. SLEDGE, ET AL.,
Petitioners,

v.

J. P. STEVENS & CO., INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION IN SUPPORT OF PETITION FOR CERTIORARI

JONATHAN R. HARKAVY
Smith, Patterson,
Follin, Curtis, James
& Harkavy
704 Southeastern Bldg.
Greensboro, N.C. 27401
Counsel for Respondent

Of Counsel:
ARTHUR M. GOLDBERG
General Counsel
Amalgamated Clothing and
Textile Workers Union
770 Broadway
New York, New York 10003

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On Petition for a Writ of Certiorari
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For the Fourth Circuit

BRIEF OF RESPONDENT AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION IN SUPPORT OF PETITION FOR CERTIORARI

Respondent Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC[1] (the "Union") respectfully submits this brief in support of petitioners' prayer that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case. The opinion of the court of appeals is reported at 585 F.2d 625.[2]

ADDITIONAL CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> "Congress shall make no law. . . . abridging the freedom of speech. . . or the right of the people peaceably to assemble. . . ."

The pertinent provisions of §9 of the National Labor Relations Act, as amended ("NLRA"), 29 U.S. §159, are:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of

1/ Amalgamated Clothing and Textile Workers Union, AFL-CIO, CLC, is the successor by merger to Textile Workers Union of America, AFL-CIO, CLC.

2/ The Union's comments are limited to Questions 1, 2 and 3 presented by the petitioners. The Union takes no position on Questions 4 and 5.

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . ."

The pertinent provisions of 28 U.S.C. §2072 are:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the districts courts of the United States in civil actions . . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . ."

THE POSTURE OF THE UNION IN THIS LITIGATION

On September 6, 1974 the Union was certified by the National Labor Relations Board as the exclusive collective bargaining representative of the production and maintenance employees of Respondent J. P.

Stevens & Co., Inc. ("Stevens") at its Roanoke Rapids, North Carolina facilities pursuant to §9 of the NLRA. This certification followed an election in which a majority of Stevens' employees in the certified bargaining unit selected the Union as its collective bargaining representative. The Union and Stevens have not entered into a collective bargaining agreement.3/

The Union did not participate in the liability stage of this litigation in the district court. It intervened after findings of facts and conclusions of law were entered for the purpose of assisting the district court in fashioning and effectuating a suitable remedy for Stevens' extensive unlawful employment practices found by the district court pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§2000e et seq. and 42 U.S.C. §1981.

3/ Stevens' bargaining tactics at Roanoke Rapids have been the subject of unfair labor practice charges resulting in a decision of the National Labor Relations Board holding that Stevens has not bargained in good faith since the Union was certified as the collective bargaining representative. J. P. Stevens & Co., Inc., 239 NLRB No. 95 (1978). Both the Union and Stevens have sought review of that decision. Amalgamated Clothing and Textile Workers Union, etc. v. NLRB, No. 78-4205 (2nd Cir.); J.P. Stevens & Co., Inc. v. NLRB, No. 78-1879 (4th Cir.).

Because of the importance of the questions which petitioners have presented for review, and particularly because the district court's inadequate claim filing requirement and restrictions on communication will have devastating and unlawful effects both in this case and in like situations, the Union supports petitioners' request that this Court review the opinion and judgment of the Fourth Circuit. Set forth below are additional reasons, fairly comprised within the questions presented by petitioners,[4/] supporting issuance of a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. The district court's restriction on communications between the Union and class members respecting a subject of legitimate Union concern contravenes rights under the First Amendment and the NLRA and conflicts with applicable decisions of this Court.

The district court's ban on communications with class members initiated by parties and their counsel effectively

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4/ Supreme Court Rule 23(1)(c).

stifles the free flow of information between class members who are in the bargaining unit and their bargaining representatives concerning the elimination of discrimination. This ban thereby affronts rights and interests under both the First Amendment and the NLRA. Because the Fourth Circuit failed to give due recognition to these rights and interests, its decision squarely conflicts with applicable decisions of this Court.

First, during the past two decades this Court has made clear that unions cannot lawfully be barred ". . . from giving any kind of advice or counsel . ." to workers concerning their legal rights and that such activity by unions is protected by the First Amendment. United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 580 (1971). Accord, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 218 n.1 (1967); Bhd. of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 3-8 (1964); NAACP v. Button, 371 U.S. 415 (1963). See also In re Primus, 56 L.Ed. 2d 417, 428-31 (1978). If the First Amendment's freedom of association has any meaning at all, it is that persons in this nation may consult together for their common betterment. The restrictions on communication in this case, however, effectively chill the day-to-day personal contacts which the Union has found so useful in consulting with its adherents and in helping them to learn about their rights. Despite the fact that such union activity is at the core of the First Amendment's protection, the Fourth Circuit failed to give any meaningful

effect to this fundamental constitutional concern.

Second, the Union, as the certified bargaining representative of a substantial number of class members, has a statutory right under the NLRA to communicate freely with all members of the bargaining unit, including class members, concerning the conditions of employment in Roanoke Rapids. "The elimination of discrimination and its vestiges is an appropriate subject of bargaining. . . . ", Emporium Capwell Co. v. West. Addition Community Org., 420 U.S. 50, 69 (1975), and unions are therefore legitimately concerned about communicating effectively with those they represent with regard to race discrimination matters. Cf. Westinghouse Electric Corp., 239 NLRB No. 19 (1978); East Dayton Tool & Die Co., 239 NLRB No. 20 (1978). Therefore, responsibilities flowing from the status of statutory bargaining representative may well be affected by the broad restrictions upon the Union's correlative right to advise and consult with its members about matters of race discrimination in employment unless this Court reviews this case to give proper effect to the NLRA, as well as the First Amendment.

The practical effects of the district court's communications ban highlights both the First Amendment and NLRA problems. The subject matter of this case touches employee rights recognized by the NLRA and thus encompassed within the Union's duty of representation. The district court's restrictions on

communications, binding on the Union as an intervenor, places the Union in daily peril of violating either the district court's order or the Union's duty to represent fairly the interests of all employees in the certified bargaining unit (which unit is coextensive with the area of the ban in Roanoke Rapids).

Moreover, it is a central fact of industrial life that an employee's fear of retaliation for exercising a right against an employer, particularly this employer, is a real fear which has a chilling effect on the exercise of that right. Cf. NLRB v. Robbins Tire & Rubber Co., 57 L. Ed. 2d 159, 177 (1978) ("The danger of witness intimidation is particularly acute with respect to current employees . . . over whom the employer, by virtue of the employment relationship, may exercise intense leverage."). It is also an important fact of industrial life that workers are not ordinarily fully aware of their legal rights partly because their time is wholly committed to their jobs and their families. Restrictions on the Union, therefore, will effectively deprive class members of a key source of both education and group comfort regarding their rights.

Especially in the area of employment discrimination, face-to-face counselling is often necessary even to understand that one is being discriminated against. From the Union's long years of experience in the shop it knows that restrictions on the free flow of information concerning employee rights will likely have a debilitating effect upon the

role of private enforcement of the laws against race discrimination in employment. The associational and speech guarantees of the First Amendment, as well as the powers and responsibilities of a union under the NLRA, were designed specifically to encourage group consultation so that individuals who might otherwise be powerless by themselves can know and (if they deem it advisable) assert their rights.

Not even lip service is paid to these fundamental concerns in the opinion of the Fourth Circuit, and a writ of certiorari should be granted so that the workers in Roanoke Rapids can be assured of securing from their bargaining representative, as well as from their counsel, the advice, information and associational comfort to which they are entitled under the First Amendment and the NLRA.

II. The district court's use of an inadequate claim filing requirement, unaccompanied by effective advice and counsel, so far departs from appropriate Rule 23 practice in an employment discrimination case that the exercise of this Court's supervisory power is necessary in order to avoid a violation of the Fifth Amendment and a massive subversion of the purposes of Title VII and 42 U.S.C. §1981.

What distinguishes this case for review in this Court is its capacity for a massive

erosion of substantive rights not intended to be permitted under the guise of an adjective rule regulating class actions. The Union has already set forth its view, based on years of experience with workers like those in Roanoke Rapids, that without day-to-day and face-to-face advice and counselling employees are not likely to be able to make a knowing and intelligent response to the proof of claim form, much less decide whether or not to waive their Title VII rights. The powerful combination of a communications ban and an inadequate form for filing a claim portends a gutting of the role of private class actions in the enforcement of Title VII and 42 U.S.C. §1981, contrary to the intent of Congress.

In terms of the Fifth Amendment, unless this Court can say with assurance that the district court's order affords absent class members the best notice practicable under the circumstances, it should not permit the district court's claim filing requirement to go into effect unmodified. There is, quite simply, no assurance whatsoever that a claimant's waiver of his rights on the claim forms set forth in the petition for certiorari will be a knowing and intelligent one, as required by the decisions of this Court. Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

Moreover, the likely substantive effects of this combination of a claim filing requirement and restrictions on the assistance of counsel draws into question the propriety of

the district court's procedure under the Rules Enabling Act, 28 U.S.C. §2072. Particularly in an employer-employee setting, where advice and comfort are needed in order to ensure a knowing and intelligent response to questions about race discrimination, is there a need for carefully conceived procedures which will not threaten either Fifth Amendment due process rights or the employee's substantive claims.

Because the district court's order, as affirmed by the Fourth Circuit, so far departs from appropriate Rule 23[5/] practice in employment discrimination cases and so far invades the substantive realm of Title VII and 42 U.S.C. §1981 in the guise of a mere adjective rule, this Court should exercise its supervisory power by granting the petition for a writ of certiorari to correct this serious situation.

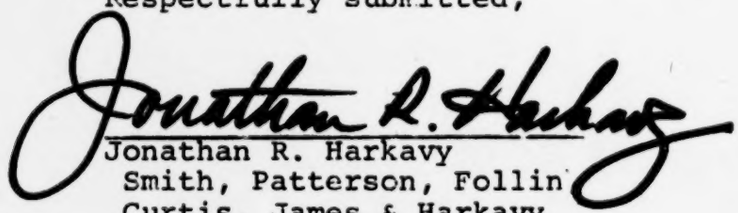
5/ Fed. R. Civ. P. 23

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

This 27th day of February, 1979.

Respectfully submitted,



Jonathan R. Harkavy
Smith, Patterson, Follin
Curtis, James & Harkavy
704 Southeastern Building
Greensboro, N. C. 27401

Counsel for Respondent
Amalgamated Clothing and
Textile Workers Union

Of Counsel:

Arthur M. Goldberg
General Counsel
Amalgamated Clothing and
Textile Workers Union
770 Broadway
New York, New York 10003